Supreme Court, U.S.
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No. 05-181

In The

Supreme Court of the United States

WILLIAM CONEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when it applied a deferential standard of review to the district court's determination that the government's tendered explanation for a delay in sealing a wiretap tape was "satisfactory" within the meaning of 18 U.S.C. § 2518(8)(a)?

2. Should the Court of Appeals have applied *de novo* review to the district court's determination that the government's tendered explanation for a delay in sealing a wiretap tape was "satisfactory" within the meaning of 18 U.S.C. § 2518(8)(a) as the Second, Eighth, Ninth and Tenth Circuits have done?

3. Can negligent, unjustifiable actions be the basis for a "satisfactory explanation" under 18 U.S.C. § 2518(8)(a), so long as the explanation dispels any reasonable suspicion of tampering?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals (the "Court of Appeals") is reported at 407 F.3d 871. The decision is reprinted in the attached appendix (App. 1-7).

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 2005. This petition is filed within 90 days of that date. Petitioner invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pursuant to the Court's Rule 14.1(f), 18 U.S.C. § 2518(8)(a) is set out verbatim:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for

use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT OF THE CASE

William Coney ("Coney") was convicted by a jury on federal drug charges. At trial, the government presented records of telephone calls intercepted under the federal wiretap statute, 18 U.S.C. § 2510. For the government to use the intercept tapes, the tapes must have been immediately sealed upon expiration of the order by the judge who issued the order for the wiretap. If the tapes were not immediately sealed, the government must establish a "satisfactory explanation" for the delay. 18 U.S.C. § 2518(8)(a) (1998).

There were two intercept orders. The tapes obtained pursuant to the first order were timely sealed. The second intercept order, granted on September 10, 1997, expired on October 10, 1997. The government did not present tapes obtained from the second intercept order to the judge for sealing until October 20, 1997, ten days after the order expired.

At trial, Coney filed a motion to suppress the second set of intercept tapes under 18 U.S.C. § 2518(8)(a). The government opposed the motion and presented, as the only evidence, the uncontested affidavits of Assistant United

States Attorneys Jacqueline Ross ("Ross") and Kaarina Salovaara ("Salovaara"). In her affidavit, Ross stated:

> From on or about September 30, 1997 through October 16, 1997, I was out of the office on a previously scheduled vacation. Prior to my departure, I had arranged with my supervisor AUSA Mark Prosperi, my partner on the case, Kaarina Salovaara and the Case Agent, FBI Special Agent Randall MacIntosh, for them to handle any and all issues relating to the Jackson investigation and the previously mentioned September 10, 1997 Interception Order. App. 12.

In her affidavit, Salovaara stated:

> The interception order obtained by Ms. Ross expired on Friday, October 10, 1997. The following Monday, October 13, 1997, was a federal holiday and the federal courts were closed. For reasons I am unable to reconstruct, the government did not move to seal the tapes with Chief Judge Aspen for an additional three days, until Friday, October 17, 1997. It is possible, but I am not certain, that I understood that Ms. Ross was returning to the office early in the week of October 13. As set forth in her affidavit, on Friday, October 17, Ms. Ross prepared the sealing application and draft order and the application was dated Friday, October 17, 1997. However she was unable to file the application and draft order that day, and they ultimately were filed with Chief Judge Aspen on Monday, October 20, 1997. App. 15.

The district court judge denied the motion to suppress, finding the government's tendered explanation for the ten day delay in sealing the tapes satisfactory. The court ruled that "[t]he explanation is *essentially* that Ross

did not communicate the necessity for a sealing to Salovaara. . . . I find the explanation satisfactory here." App. 10-11 (emphasis added). Coney appealed the court's ruling to the Seventh Circuit Court of Appeals. After stating the facts of the case, the Seventh Circuit discussed the appropriate standard of review. The Seventh Circuit stated that there was a two to one circuit split in favor of *de novo* review on the standard of review for whether the government's explanation for a delay in sealing the tapes was "satisfactory." The Court of Appeals sided with the minority position and held that deferential review was the correct standard of review when determining whether the government's explanation for the delay was "satisfactory" under 18 U.S.C. § 2518(8)(a). The Court of Appeals then stated that satisfactoriness under 18 U.S.C. § 2518(8)(a) was "a factual rather than a legal determination" and deference to the trial judge was therefore in order. App. 3-4.

Applying this deferential standard of review, the Court of Appeals, relying solely on the affidavits of Ross and Salovaara and the District Court's denial of Coney's motion to suppress, held the government's explanation of the delay in sealing the tapes to be "satisfactory." The Court of Appeals held that "an explanation is satisfactory if, in the circumstances, it dispels any reasonable suspicion of tampering." The court then concluded: "the explanation offered for the lapse was satisfactory. . . . There was neglect, but it was harmless and therefore, while it was not justifiable, it was excusable." App. 5-7.

Pursuant to the Court's Rule 14.1(g)(ii), the United States District Court for the Northern District of Illinois, Eastern Division had jurisdiction pursuant to 18 U.S.C.

§ 3231, which provides original jurisdiction for all offenses against the laws of the United States.

REASONS FOR GRANTING THE WRIT

1. Pursuant to Supreme Court Rule 10(a), a compelling reason exists for granting the requested writ because there is a split amongst the United States Courts of Appeals on an important matter. *See, e.g., Miller v. Fenton,* 474 U.S. 104, 109 (1985) ("Because the Courts of Appeals have reached differing conclusions on whether state-court voluntariness determinations are entitled to . . . presumptions of correctness . . . we granted certiorari."); *Ornelas v. United States,* 517 U.S. 690, 695 (1996) ("We granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review."); *Buford v. United States,* 532 U.S. 59, 62 (2001) ("In light of the different circuits' different approaches to the problem, we granted the writ.").

The Court of Appeals' decision in *Coney,* adopting a deferential standard of appellate review on whether the government's tendered explanation is "satisfactory" under 18 U.S.C. § 2518(8)(a) is in direct conflict with the standard adopted in four circuits. The Courts of Appeals for the Second, Eighth, Ninth and Tenth Circuits have held the issue of whether an explanation is "satisfactory" to be a question of law, and therefore apply *de novo* review to the district courts' rulings. *United States v. Cline*, 349 F.3d 1276, 1284 (10th Cir. 2003); *United States v. Pederoni*, 958 F.2d 262, 265 (9th Cir. 1992); *United States v. Sawyers*, 963 F.2d 157, 159 (8th Cir. 1992); *United States v. Maldonado-Rivera*, 922 F.2d 934, 950 (2d Cir. 1990) (*citing United States v. Rodriguez*, 786 F.2d 472, 476 (2d Cir.

1986) ("This question is not a matter of basic or historical fact but rather is a question of the interpretation of the statute. . . . The district court's rulings on such questions are subject to a full review on appeal")).

In direct conflict with the Second, Eighth, Ninth and Tenth Circuits, the Courts of Appeals for the Sixth and Seventh Circuits hold the issue of whether an explanation is "satisfactory" to be a question of fact and therefore apply deferential review to the district courts' rulings. App. 4 (holding whether the government's explanation is "satisfactory" is a "factual rather than a legal determination"); *United States v. Wilkinson*, 53 F.3d 757, 760 (6th Cir. 1995).

Furthermore, the standard of review concerning the satisfactoriness of the government's explanation for a delay in sealing the wiretap is an important matter. This Court has, in the past, granted certiorari to resolve a circuit split over the standard of review on a "legal question [that] is a minor, detailed, interstitial question of sentencing law, buried in judicial interpretation of an application note to a Sentencing Guideline." *Buford*, 532 U.S. at 65. On the other hand, the issues raised in this case are "importan[t] to the administration of criminal justice" and therefore must be addressed by this Court. *Miller v. Fenton*, 474 U.S. 104, 109 (1985). In *Fenton*, this Court granted certiorari to resolve a circuit split over the appropriate appellate standard of review for whether a confession was "voluntary," because a confession can be such powerful evidence that the issue is one of importance to the criminal justice system. *Id.* at 10-19.

Similarly, a wiretap tape can be powerful evidence against a criminal defendant. It is stronger than a confession, as it contains the defendant's admission and description of his possibly illegal actions and there may be reluctance to